SUPREME COURT, U. S.
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(1040)

IN THE

Supreme Court of the United States

No. 234—October Term, 1961

MARIE BENZ,

Petitioner,

against

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Opinions Below

Special Term of the Supreme Court of the State of New York, in an opinion dated February 11, 1960 (unreported), dismissed the petitioner's complaint (5-11).[1]

The memorandum decision of the Appellate Division of the Supreme Court is reported at 11 A. D. 2d 906, 205 N. Y. S. 2d 1004 (28), and resulted in an order of affirmance entered July 1, 1960 (26-27).

The majority opinion of the Court of Appeals of the State of New York, rendered April 27, 1961, affirming the decision below, and the dissenting opinion are reported at 9 N. Y. 2d 486, 174 N. E. 2d 727 (32-37).

[1] All references are to pages in the Record herein.

By order, dated October 5, 1961, the Court of Appeals (10 N. Y. 2d 806) amended its remittitur by adding the following (38-39):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.*: Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation."

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are set forth in Petitioner's Brief (p. 2).

On October 23, 1961 this Court granted the petition for a writ of certiorari (41) (368 U. S. 886).

Questions Presented

1. Whether this Court may review the determination of the New York Court of Appeals that the State of New York and the respondent herein are immune to suits in equity.

2. Assuming, *arguendo*, that such power of review does reside in this Court, whether the respondent, as an instrumentality of the State, engaged in an operation which is purely governmental in nature, is clothed with the sovereign's immunity to suits in equity.

3. Whether the immunities of the State, as guaranteed by the Eleventh Amendment to the Federal Constitution are overridden by the "due process" clause of the Fourteenth Amendment.

4. Whether petitioner is entitled to equitable relief in the face of available adequate remedies at law.

Constitutional Provisions and Statutes Involved[2]

Involved in this application are:

United States Constitution, Amendments XI and XIV;
New York Public Authorities Law, Title 9.
New York Highway Law § 347:
New York Court of Claims Act § 10 (1).

Statement

The Attorney General of the State of New York appeared specially for the respondent and moved to set aside the service of the summons on the ground that the Court did not have jurisdiction over the person of the respondent, or in the alternative, to dismiss the complaint on the ground that the Court did not have jurisdiction over the subject matter of the action (21).

The complaint (12-16) alleges that the petitioner and the respondent[3] entered into an Agreement of Adjustment (17-20) to reimburse the petitioner for the value of certain property appropriated by the Superintendent of Public Works of the State of New York for Thruway purposes, and that by reason of the mutual mistake of the petitioner and the respondent or by the mistake of the petitioner and the fraud of the respondent, the Agreement of Adjustment was incorrectly drawn and does not state the actual agreement of the parties. The actual agreement is separately set forth in the complaint.

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[2] The pertinent sections of the Constitution and the statutes are set forth in the Appendix hereto.

[3] It may be observed that the Agreement of Adjustment was executed on behalf of the respondent by the Director of the Bureau of Rights of Way and Claims, which is a division of the Department of Public Works of the State of New York, and the agreement was approved by an agent of the *State* Comptroller (20).

The petitioner seeks relief in the alternative—either reformation, as is in the complaint specifically set forth, or rescission.

Summary of Argument

The New York Court of Appeals has held that the State of New York has not waived its immunity with respect to suits in equity. It has also held that, as an agency of the State of New York engaged in a purely governmental function, the New York State Thruway Authority was entitled to assert the same immunity from suit, except insofar as the Legislature may have waived immunity. In other words, the action against the Authority was considered, in effect, as an action against the State. The Court found that there had been no legislative waiver, as to the Authority, respecting suits for traditional equitable relief. Since the instant action is one for traditional equitable relief—reformation or rescission—the Court of Appeals affirmed the judgment of the Court below, which had dismissed the complaint.

It is not within the purview of this Court's power of appellate review to overrule the State Court on this question because the issue of law is within the peculiar prerogative of the State to determine for itself. This is implicit in the provisions of the Eleventh Amendment to the Federal Constitution. Numerous decisions of this Court, cited in the Argument, *infra*, establish clearly that the sovereign immunity of the States which is guaranteed by this Amendment is absolute, that the question of waiver depends upon whether the State intended to waive the immunity, and that the question whether there has been a waiver and the extent thereof are determinable only by the State Courts. Whether the question arises in connection

with the jurisdiction of the lower Federal Courts in cases originating in such Courts, or whether the question arises for the first time, as here, upon appellate review by this Court of the State Court's determination, the rule is applied equally.

Thus, that the New York State Thruway Authority is a governmental agency of the State of New York and, as such, immune to a suit in equity, is to be accepted as the governing principle of State law.

However, assuming, *arguendo*, that this Court does possess the power to review this question, it is submitted that, in fact, the Authority is an agency of the State engaged in a purely governmental function and, as such, virtually identical with the State, so that it has the same immunities as has the State itself.

Therefore, whether considered without review or after review, the basic premise of immunity should be accepted and subjected to the only true Federal question which has been submitted to this Court—are the immunities guaranteed under the Eleventh Amendment subject to the due process provision of the Fourteenth Amendment? Does the Fourteenth Amendment override or repeal the Eleventh?

In the consideration of this question, the Court may not give weight to the fact that other States may have tended in recent years to cut down or limit the concept of sovereign immunity or that the Federal Courts, in dealing with Federal agencies, have, likewise, impugned the concept. Each State has the right to decide this question for itself. Its right to do so is absolute.

The sole question to be decided by this Court is the relative supremacy of the Eleventh and Fourteenth Amend-

ments. Case after case in this Court has enunciated the supremacy of the Eleventh Amendment—that the right of individuals to sue a State, in either a Federal or a State Court, cannot be derived from the Constitution or laws of the United States, but can come only from the consent of the State.

In essence, the petitioner's argument begs the question. She asserts that when property is taken by eminent domain, the failure of the Legislature to provide a remedy or permit suit does not defeat suit because the constitutional provision for "just compensation" is self-executing. This is undoubtedly true because the constitutional provision, itself, constitutes a waiver of immunity. It must be observed, however, that in the case at bar we are not dealing with an uncompensated act of eminent domain, but rather with the right of an individual to sue the State in an equitable action seeking reformation or rescission of a contract.

In any event, disregarding the question of immunity, it is clear, as appears in the ensuing argument, that adequate relief at law is available to the petitioner in the State's Court of Claims. The existence of adequate relief at law, of course, is sufficient to defeat this suit in equity.

ARGUMENT

POINT I

The petition for certiorari was improvidently granted by the Court and should now be dismissed for want of a substantial Federal question.

A. The question of sovereign immunity is a question of State law which is not reviewable in this Court.

In the case at bar the New York Court of Appeals stated its conclusion of law that "for purposes of suit the Thru-

way Authority was part of the State Government and, accordingly, not suable without a direct waiver of immunity" (9 N. Y. 2d 486, 489, 174 N. E. 2d 727, 728). This was merely a reiteration of its earlier pronouncement in *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956).

That the State is immune to suit and liability of any kind except in those instances where it has consented thereto by an express and specific constitutional or legislative enactment, is ancient and well established doctrine which has been consistently followed in the State of New York (*Stone* v. *State of New York*, 138 N. Y. 124, 130, 33 N. E. 733 [1893]; *Matter of Hoople*, 179 N. Y. 308, 311, 72 N. E. 229 [1904]; *Sanders* v. *Saxton*, 182 N. Y. 477, 479, 75 N. E. 529 [1905]; *Saranac Land and Timber Co.* v. *Roberts*, 195 N. Y. 303, 320, 88 N. E. 753 [1909]; *Niagara Falls Power Co.* v. *White*, 292 N. Y. 472, 479, 55 N. E. 2d 742 [1944]). Dispositive of the question of immunity is *Psaty* v. *Duryea*, 306 N. Y. 413, 416-417, 118 N. E. 2d 584 (1954), in which the highest Court of the State of New York held:

(1) That the State may not be sued in any Court upon any cause of action unless it has expressly and explicitly waived its sovereign immunity with respect to such cause of action; and

(2) That the State has not given its consent to be sued upon a cause of action which is, primarily, an equitable action for rescission, and thus, "a suit for traditional equitable relief."

In the State Courts the petitioner sought a reconsideration of the doctrine of sovereign immunity but met with utter failure. Whatever the present rule may be in other jurisdictions, including the Federal, there is no doubt that

in New York the doctrine remains unchanged and that it applies not only to cases where the State is named as a party defendant, but to cases, in which, though not a nominal party, it is such in effect (*Psaty* v. *Duryea, supra; Breen* v. *Mortgage Commission of the State of New York*, 285 N. Y. 425, 35 N. E. 2d 25 [1941]; *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 [1956]; *Easley* v. *New York State Thruway Authority, supra; Benz* v. *New York State Thruway Authority, supra* [case at bar]).

The determination of the question of sovereign immunity is peculiarly a matter of State law which is adequate to support the determination and which is not reviewable in this Court. This is implicit in the provisions of the Eleventh Amendment to the Federal Constitution.[4]

Preliminarily, it may be observed that the fact that the petitioner is a citizen of the State and the fact that the State is not a party to the suit of record are not inhibiting influences in the application of the Eleventh Amendment to the case at bar. A suit against a State by one of its own citizens, the State not having consented to suit, is as much forbidden as are suits by citizens of another State or by citizens or subjects of foreign States (*Hans* v. *Louisiana*, 134 U. S. 1 [1890]; *Fitts* v. *McGhee*, 172 U. S. 524 [1899]; see, also: *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273 [1906]; *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 299 [1952]). And in *In re Ayers*, 123 U. S. 443, 487-492 (1887), it was held that the doctrine of sovereign immunity was not restricted to cases in which the State was a party of record.

Although we are not here concerned with the determination of Federal jurisdiction insofar as suit may be com-

[4] See Appendix, *infra*, p. 1a.

menced in the lower Federal Courts, it is interesting to note that even in such cases, where consideration has been given to the impact of the Eleventh Amendment, it has been uniformly held that State law and the decisions of State Courts are dispositive of the question. Thus, even when the status of the State, engaged in a purely private enterprise, was involved, the State law was held to require a dismissal of the Federal suit for want of jurisdiction (*State of North Dakota* v. *National Milling & Cereal Co.*, 114 F. 2d 777 [8th Cir., 1940]). The same rule has been applied to the determination of the nature, rights, powers, duties, obligations and liabilities of counties, municipalities, townships and other public corporations. Thus, in *Railroad Commission of California* v. *Los Angeles Ry. Corp.*, 280 U. S. 145 (1929), this Court said (p. 152):

> "This Court is bound by the decisions of the highest courts of the States as to the powers of their municipalities."

And in *Georgia Ry.* v. *Decatur*, 262 U. S. 432 (1923), it was said (p. 438):

> "This conclusion [*i.e.*, the determination of the Supreme Court of Georgia], involving, as it does, a construction of the state constitution and laws and powers of state municipalities is controlling upon this Court, as it has decided many times. See, for example: *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Richmond* v. *Smith*, 15 Wall. 429, 438."

In *Richmond* v. *Smith*, 15 Wall. 429 (1872), cited in the *Decatur* case, *supra*, the Court said (p. 438):

> "State courts certainly have a right to expound the statutes of the State, and having done so, those statutes, with the interpretation given to them by the highest court of the State, become the rules of decision in the Federal courts."

See also: *Louisiana Land & Exploration Co.* v. *State Mineral Board*, 229 F. 2d 5 (5th Cir., 1956), cert. den. 351 U. S. 965 (1956); *Dupont* v. *South Carolina Public Service Authority*, 100 F. Supp. 778 (E. D., So. Carolina, 1951); *Fleming* v. *Upper Dublin Public School District*, 141 F. Supp. 813 (E. D., Pennsylvania, 1956).

Even in cases other than those involving the Eleventh Amendment, where Federal jurisdiction is conceded, it has been held time and again that the Federal rule of decision on the substantive question must follow the State rule (*Commissioner of Internal Revenue* v. *Stern*, 357 U. S. 39, 45 [1957]; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 [1941]; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 [1940]; *Russell* v. *Todd*, 309 U. S. 280 [1940]; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103 [1939]). In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), this Court said (p. 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The rule which requires Federal Courts in such cases to follow the State law applies even though the State Court rulings are contrary to the weight of authority (*Johnson* v. *New York Life Ins. Co.*, 212 F. 2d 256 [7th Cir., 1954], cert. den. 348 U. S. 836 [1954]), contrary to the views of the Federal Court (*Johnson* v. *New York Life Ins. Co.*,

supra; Kraus v. *Greenbarg*, 137 F. 2d 569, 571 [3rd Cir., 1943], cert. den. 320 U. S. 791 [1943]), or even though there is a well established Federal rule on the subject (*West* v. *American Telephone & Telegraph Co., supra*).

Since, as has been demonstrated, the question of State immunity is a matter of State law, it follows that the treatment of this question, upon certiorari to the State Court, as in the case at bar, can be no different from its treatment in determining original Federal jurisdiction. The State law applies as effectively in the one case as it does in the other, and this Court has so held. In *Caldarola* v. *Eckert*, 332 U. S. 155 (1947), the Court said (p. 158):

> "Insofar as the issues in this case exclusively concern New York law, that court [*i.e.*, the New York Court of Appeals] had the final say * * *."

As a general rule, the highest Court of a State may administer the common law according to its own understanding and interpretation, without liability to review in this Court unless some right, title, immunity or privilege, Federaliy created, has been asserted and denied (*American Ry. Express Co.* v. *Kentucky*, 273 U. S. 269 [1927]; *West* v. *Louisiana*, 194 U. S. 258 [1904]). The determination in the case at bar by the New York Court of Appeals that the respondent is an instrumentality of the State engaged in a purely governmental function and is not suable in an action in equity by reason of the fact that the suit is, in effect, against the State, is a sufficient non-federal ground, the correctness of which cannot be considered in this Court (*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 129 [1945]). This Court has held that it will not inquire whether a State Court decision, denying constitutional protection to rights asserted under local law on non-federal grounds, fairly supported, is right or wrong, where the con-

stitutional issue is not evaded. In *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36 (1943), the Court quoted (p. 42) from *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540 (1930) as follows:

> " 'But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.' "

See also, *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 274 U. S. 651, 655 (1927).

The contention that the State law, whether statutory or decisional, is void because it is contrary to public policy does not present a Federal question (*Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U. S. 285, 290 [1924]). Insofar as this Court may have expressed a policy in favor of a contraction of the sovereign immunity doctrine in cases affecting the *National Government's* immunity (see *e.g.*, *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 388-389 [1939]), we must keep in mind, first, this Court's distinction between State and National immunity, as set forth in the *Keifer* case (p. 388):

> "As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication."

Second, we must note this Court's observation in *Fay* v. *New York*, 332 U. S. 261 (1947), at page 287:

> "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and *these expressions of policy are not necessarily embodied in the concept of due process.*" (Emphasis added.)

In the last analysis, when the alleged basis of waiver of the Eleventh Amendment's immunity is a State statute, as is the situation in the case at bar, the question to be answered is whether the State has intended to waive its immunity (*Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U. S. 275, 278 [1959]). From the foregoing analysis, it is apparent that the only Court which is legally competent to answer this question is the State Court, and that this Court accepts the State Court's interpretation of State law (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 49 [1944]; *Chicago, etc., R. Co.* v. *Risty*, 276 U. S. 567, 570 [1928]; *Quong Hoa Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448 [1921]; *Sauer* v. *New York*, 206 U. S. 536, 545-548 [1907]; *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, 240 [1928]; *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427 [1916]; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 [1903]; *Ross* v. *Oregon*, 227 U. S. 150, 162 [1913]).

The petitioner suggests a contraction, if not, indeed, an abandonment, of the doctrine of sovereign immunity (Brief, pp. 21 *et seq.*), but forgets (1) that irresponsibility has been constitutionally incorporated into the law by the Eleventh Amendment, and (2) that she is addressing a Court and not the Legislature. It is for the latter to determine whether the State shall be put in a position to be cast, as Dean Pound put it (Fortune, Nov. 1949, p. 171), in the role of the "involuntary good samaritan." It is for the latter to consider, on the policy level, whether for reasons of reparation, prevention or otherwise, it will lower the bar. So long as the Eleventh Amendment remains the law of the land, it rests with the State Legislature alone to waive its benefits, and its failure to do so cannot be overridden by judicial action either in the State or the Federal

Courts. The legislative discretion is absolute; only State legislative consent can effect a waiver.

B. Asserted rights of individuals under the Fourteenth Amendment to the Federal Constitution are not superior to, and do not override, the provisions of the Eleventh Amendment.

One of the questions which the petitioner has presented to this Court is the question whether the "due process" provision of the Fourteenth Amendment overrides a State's immunity from suit (Petitioner's Brief, p. 8). The petitioner asserts that, so far as the Federal Courts are concerned, the question is novel.

However, the question is not novel and has, in several cases, been decided by this Court adversely to the petitioner's contention. This Court has held that sovereign immunity may be asserted by a State in actions which seek to enforce rights which are generally protected under the due process or other provisions of the Constitution. In *Missouri* v. *Fiske*, 290 U. S. 18 (1933), it was said (pp. 25-26):

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States. 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' *Ex parte New York*, 256 U. S. 490, 497. *Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or*

> *laws of the United States. Hans* v. *Louisiana*, 134 U. S. 1, 10; *Palmer* v. *Ohio*, 248 U. S. 32, 34; *Duhne* v. *New Jersey*, 251 U. S. 311, 313, 314." (Emphasis added.)

In *Hans* v. *Louisiana*, 134 U. S. 1 (1890), the constitutional provision which was involved was the provision against the impairment of the obligation of contracts. In *Palmer* v. *Ohio*, 248 U. S. 32 (1918), as in the case at bar, it was contended that the "due process" provision of the Constitution justified a disregard of the doctrine of sovereign immunity. The Court rejected this contention, saying (p. 34):

> "The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Company* v. *Tennessee*, 101 U. S. 337; *Hans* v. *Louisiana*, 134 U. S. 1."

Insofar as the petitioner has posed the question of the relative supremacy of the Eleventh Amendment *vis-à-vis* the "just compensation" clause of the Fifth Amendment as it may be deemed included in the "due process" clause of the Fourteenth Amendment (Petitioner's Brief, p. 3), it is important to note that her lawsuit does not involve the taking of property without the payment of just compensation. Such an uncompensated taking was involved in *Hopkins* v. *Clemson College*, 221 U. S. 636 (1911), cited by petitioner, but it is this very aspect of the cited case which renders it inapposite to the issue herein. We do not resist the contention that sovereign immunity is no defense to a taking under the power of eminent domain. Indeed, whatever immunity there may originally have been to such a suit against the State has been waived in the most effective way and on the broadest possible base by the provision of

the State Constitution which provides for the payment of just compensation upon a taking by eminent domain (New York Const. Art. I § 7).[5]

However, that is not the situation in the case at bar. Although the contract which is the subject of this suit dealt with the compensation which was to be paid by reason of an act of eminent domain, the question before the Court does not involve the factual situation which underlay and brought about the making of the contract. Rather, it involves the *making* of the contract and, more directly, an asserted right to sue the State in an equitable action seeking either to *make over* or *undo* the contract. The action is for reformation or rescission of the contract, and the subject of the contract is irrelevant to the resolution of the question here presented.[6]

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[5] This conceded constitutional waiver respecting State liability as a result of an act of eminent domain is all that may be gleaned from the cases cited by the petitioner on pages 9-11 of her brief. The State cases there cited merely stand for the proposition that if an act of eminent domain is the basis of State liability, the constitutional provision for "just compensation" is self-executing and the failure of the Legislature to provide a remedy does not permit the assertion of immunity by the State or its agents in an action predicated on that liability. We agree, but we must reiterate that this lawsuit does not involve an act of eminent domain. It involves a suit to reform or rescind a contract. It is merely by coincidence that the liability arising from an act of eminent domain was the motivating force which led to the making of the contract. The factor which led to the contract is no more legally relevant to the issue than if the contract involved a sack of potatoes.

[6] Incidentally, the assertion by the petitioner (Brief, p. 12) that, in one guise or another, suits have often been allowed against the sovereign is without support in the decisions of this Court which she cites. In the first place, in all of the cases cited the sovereign involved was the United States, so that the Eleventh Amendment did not come into play. Secondly, taking the first case cited as typical of this Court's view, even in its earlier days—*The Siren*, 7 Wall. 152 (1868)—we find the Court reiterating the doctrine of sovereign im-

(Footnote continued on following page)

It is pertinent to observe, in this connection, that sovereign immunity extends to the enforcement of equitable rights and the prosecution of equitable remedies by an individual against a State. In *Missouri* v. *Fiske*, 290 U. S. 18 (1933), the Court said (p. 27):

> "The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited. Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when they are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 497; *Fitts* v. *McGhee*, 172 U. S. 516, 529."

In the consideration of the Eleventh and Fourteenth Amendments in juxtaposition to each other, consideration

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(Footnote continued from preceding page)

munity as a "familiar doctrine of the common law" (p. 153), from which it would not recede. However, since the United States had *instituted* the action the defendant was permitted to assert, by way of set-off, an affirmative defense, but not a counterclaim. The Court said (p. 154): "But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand of property in controversy."

may well be given to the analogous statement of this Court in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 64 (1936):

> "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

By the same token the immunities guaranteed to the States by the Eleventh Amendment cannot be deemed forbidden by the Fourteenth.

From the foregoing it is apparent that it cannot be asserted that the Fourteenth Amendment has resulted in the repeal of the Eleventh Amendment, whether we consider the impact of the guarantee of "due process" alone or the impact of the guarantee of "just compensation" as included in the concept of "due process." Since the nonfederal ground—sovereign immunity—was the basis of the adjudication by the Court of Appeals, and since, as has been demonstrated, it is an adequate basis for the adjudication, this Court should dismiss the petition as having been improvidently granted (*Wood* v. *Chesborough*, 228 U. S. 672, 676-680 [1913]; *West Chicago St. R. Co* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-520 [1906]; *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Comrs.*, 200 U. S. 561, 580-581 [1906]).

C. The alleged Federal question lacks substantiality.

As has been stated, the petitioner seeks to reform or rescind an "Agreement of Adjustment" under which the respondent agreed to compensate her for the taking of part of her land under the power of eminent domain. The agreement was entered into in lieu of a judgment of the State Court of Claims, which would have ensued upon the prose-

cution of a claim in that Court, and was entered into pursuant to statutory authorization.[7]

The essence of the petitioner's complaint is that she agreed to accept a wholly inadequate sum as compensation for her claim. But the substantiality of her claim of violation of due process under the Federal Constitution can be no greater in the case of an agreement between the parties than it would be in the case of an award by the Court of Claims. This Court has held that as long as compensation is made or provided for, the amount of the compensation, as a purely *quantum* question, does not present a substantial Federal question (*Appleby* v. *Buffalo*, 221 U. S. 524, 531-533 [1911]; see also: *McCoy* v. *Union Elevated R. R. Co.*, 247 U. S. 354, 363 [1918]; *McGovern* v. *New York*, 229 U. S. 363, 371 [1913]; *Roberts* v. *New York City*, 295 U. S. 264, 277-278 [1935]).

POINT II

Assuming, *arguendo*, that this Court does possess the power to review the judgment of the Court below, the judgment should be affirmed because: (a) the State has not waived its immunity from suits in equity; (b) the suit is, in effect, a suit against the State by reason of the fact that the respondent is an instrumentality of the State engaged in an operation which is governmental in nature; and (c) alternative relief is available to the petitioner in the State's Court of Claims.

A. The State has not waived its immunity to suits in equity.

The authorities which establish this conclusion have been set forth in Point I, subd. A, *supra*.[8]

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[7] See Appendix, Highway Law § 347(12) *infra*, pp. 1a-2a.

[8] See pp. 6-11, *supra*.

B. The suit is, in effect, a suit against the State by reason of the fact that the respondent is an instrumentality of the State engaged in an operation which is governmental in character, and no statutory waiver has been enacted which would permit maintenance of the instant cause of action.

(1) *The New York State Thruway Authority is an instrumentality of the State.*

In 1942 the New York Legislature approved a plan for the New York State Thruway. Pursuant to Highway Law, Article XII-A (L. 1942, ch. 914) the Department of Public Works constructed several segments of the Thruway system prior to 1950. In March of 1950 a committee, appointed by the Governor, recommended the creation of an Authority with power to finance, construct and operate the Thruway. At the time of this report the State had already expended some $25,000,000 on the construction of the Thruway and it was the recommendation of the committee that the construction at State expense should continue until such time as the Authority could perfect plans for financing the project. In this connection the report of the committee pointed out that since the Authority would undertake to finance from revenues major highway improvements which would otherwise be a direct burden on the State, it was fitting and proper that the State undertake to support the obligations of the Authority with the State's credit. This would have the effect of lowering the interest rate and decreasing the required margin of prospective earnings necessary to attract investors in the bond market. The report recognized that such a guarantee would require a constitutional amendment and recommended such amendment. (Public Papers of Governor Thomas E. Dewey, 1950, pp. 623-628.)

On March 9, 1950, the Governor, in a message to the Legislature, recommended the creation of the Authority and the enactment of a constitutional amendment *permitting State guarantee of its bonds.*

The Thruway Authority was created by L. 1950, ch. 143, which added Title 9 (§§ 350-375) to Public Authorities Law, Article 2, and supplemented Highway Law, Article XII-A. The act provides that it shall be "a body corporate and politic constituting a public corporation," its members to be appointed by the Governor with the advice and consent of the Senate, and its corporate existence to continue so long as it has bonds outstanding. *Upon its termination "all its rights and properties shall pass to and be vested in the state"* (§ 352). It is provided that the purpose of the Authority is to construct, maintain and operate a thruway system for the benefit of the people of the State and to facilitate transportation and commerce, and *"the authority shall be regarded as performing a governmental function in carrying out its corporate purpose"* (§ 353).

The inter-relationship between the Authority and the various departments of the State is made clear in the Thruway Act. In the absence of assumption of jurisdiction by the Authority, the Superintendent of Public Works has all the powers to construct, maintain and operate all or any part of the Thruway system (§ 356). Even after the Authority has assumed jurisdiction the Superintendent of Public Works is required to furnish engineering services in connection with construction contracts let by the Authority, and such services and other work of construction, reconstruction and improvement by the superintendent must be carried on, generally, in the same manner and subject to the same provisions of law as apply to the construc-

tion and improvement of state highways (§ 359). At the request of the Authority the Superintendent of Public Works may take over maintenance and operation of all or any part of the System (§ 360). Real property necessary for the construction and operation of the Thruway is acquired for the Authority *in the name of the People of the State of New York* by the Superintendent of Public Works in accordance with the procedure provided in Highway Law § 347 (§ 358). Legal services are rendered to the Authority by the State Department of Law (§ 362) and the services of the State Department of Motor Vehicles are made available for the collection of annual fees for the use of the Thruway (§ 362). It is similarly provided that all other State officers, departments, boards, divisions and commissions shall render such services as are within their respective functions (§ 362). The provisions of the Civil Service Law are made applicable to the Authority (§ 354 [6]), and the statute authorizes the transfer of officers and employees from various departments of the State (§ 355). The Authority is required to make annual reports to the Governor, the Legislature, the Comptroller and the Director of the Budget (§ 363), and all monies of the Authority are paid to the Comptroller as its agent (§ 364). The annual reports of the Authority indicate that since its inception it has utilized the services of all of the foregoing departments, as well as of the Division of State Police and the State Division of Standards and Purchase.

The Authority has been given the right to possess and use the real property of the State for its corporate purposes (§ 357), and is specifically authorized to acquire and hold real property "*in the name of the state*" (§§ 354[4], 358, 358-a) but as has been stated, such real property is, in practice, acquired by the Superintendent of Public

Works under the provisions of the Highway Law which vest in the Court of Claims exclusive jurisdiction to determine the value of the property appropriated and the legal damages therefor. The Authority is empowered to make traffic rules and regulations which are to be enforced either by the State Police or by its own employees who shall be uniformed peace officers and who shall possess all the powers of a police officer (§ 361). The property of the Authority and its income and operations are *exempt from taxation* (§ 371).

The statute provides for the *guarantee by the State of the notes and bonds of the Authority* "to the extent authorized by the Constitution at the time of the issuance of notes or bonds" (§§ 366, 369). The same Legislature which enacted this statute adopted a resolution calling for the Amendment of the Constitution to authorize such a guarantee to the extent of $500,000,000. This resolution was passed for the second time in 1951 and adopted by the people at the general election in the Fall of 1951. The Authority has issued bonds and notes guaranteed by the State in the amount of $500,000,000.

Although the Act empowers the Authority "to sue and be sued" (§ 354[1]), jurisdiction is vested in the Supreme Court, Albany County, of an action by a trustee for the noteholders and bondholders against the Authority upon the specific causes therein set forth (§ 368). In 1954, prior to the time the Authority assumed control of the Thruway and began to operate it, the Legislature enacted the Public Authorities Law § 361-b (L. 1954, ch. 517, eff. April 7, 1954) which conferred upon the Court of Claims exclusive jurisdiction to hear and determine claims against the Authority for its tortious acts and those of its agents.

The foregoing clearly establishes the virtual identity of the State and the Authority. In fact, the identity has already been judicially recognized. In *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572, 573 (1956), the Court said (p. 376):

> "The Thruway Authority is 'a body corporate and politic constituting a public corporation' (Public Authorities Law, § 352) which performs part of the work of the State Government in building and maintaining a highway. *It cannot be doubted that this Authority is an arm or agency of the State.*" (Emphasis added.)

In the case at bar the Court of Appeals reiterated its holding that the Thruway Authority is an arm or agency of the State (32-33).

(2) *The New York State Thruway Authority is engaged in an operation which is governmental in character.*

The New York Court of Appeals had occasion to pass squarely on the question of the immunity shared by agencies of the State carrying out governmental functions. In *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 (1956), Judge Fuld said (pp. 440-441):

> "Little argument is required to demonstrate that the Retirement System is the kind of state instrumentality that is clothed with the sovereign immunity of the state. It is engaged in an important governmental function, and providing retirement pensions, annuities and other employment benefits for its personnel, comparable to those received by the employees of private industry, certainly assists and promotes the efficient operation of the affairs of the state itself. The close relationship between the Retirement System and the state government is apparent throughout the Civil Service Law provisions which create and govern the affairs of the System. Thus, the State Comptroller is made its administrative head and trustee of

its several funds (§§ 52, 70, subd. b), the Attorney-General, its legal adviser (§ 53), and custody of its funds is placed in the charge of the Department of Taxation and Finance (§ 70, subd. d). The state, as an employer of members of the Retirement System, is obligated for the maintenance of various reserves and funds of the System, as well as for its expenses and the payment of all employee benefits (§ 67)."

All of the criteria which led the Court to find that the Retirement System was clothed with the sovereign immunity of the State are present in the instant case. The Authority "is engaged in an important governmental function". The close relationship between the Authority and the State government, as shown in sub-section 1 of this sub-point, *supra*, is apparent throughout the Public Authorities Law provisions which create and govern the affairs of the Authority.

Most importantly, the legal proposition has been definitely and clearly enunciated that the establishment, construction, and maintenance of highways is a primary governmental function. Thus, in *New Paltz, H. & P. Traction Co.* v. *Ulster County*, 202 App. Div. 234, 195 N. Y. Supp. 623 (3rd Dept., 1922), the Court said (p. 237):

> "*The construction, maintenance and control of highways is a governmental function.* For convenience of administration, counties and towns were organized and to them were delegated certain powers and duties well defined and limited by statute, among which are some duties in the construction, maintenance and control of highways, *in discharging which they are performing a governmental duty* and their officers acting therein are the agents of the public or the State." (Emphasis added.)

See, also: *Neddo* v. *State of New York*, 194 Misc. 379, 386, 85 N. Y. S. 2d 54 (Ct. Cl., 1948), aff'd. 275 App. Div.

492, 90 N. Y. S. 2d 650 (3rd Dept., 1949), affd. 300 N. Y. 533, 89 N. E. 2d 253 (1949).

The rule is almost universal in its application. In *Atkin* v. *Kansas*, 191 U. S. 207 (1903), this Court said (pp. 221-222):

> "The improvement of the Boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character."

See, also, *Petty* v. *Tennessee-Missouri Bridge Commission*, 254 F. 2d 857, 859 (8th Cir., 1958), revd. on other grounds, 359 U. S. 275 (1959).[9]

In *Muszynski* v. *New Jersey Turnpike Authority*, 27 N. J. Super. 248, 99 A. 2d 326 (1953), a case involving an Authority which is virtually identical with the respondent in character, nature and powers, the Court said (p. 327):

> " 'The construction, maintenance and operation of highways, bridges and tunnels is one of the primary governmental functions of the states,' citing cases. [Reference is to *Miller* v. *Port of New York Authority*, 18 N. J. Misc. 601, 603, 15 A. 2d 262, 264.]
>
> The court held in substance in the *Miller* case, *supra*, that the Port of New York Authority was the *alter ego* of the State and there could be no recovery against it, except on the basis of the condemnation process where negotiations had failed. The case of *Miller* v. *Port of New York Authority*, *supra*, is here controlling. The legal status of the defendant here is in the same category as that of the Port of New York

[9] For discussion of this case, see subsec. I, *infra*, at pp. 35-36.

Authority in the *Miller* case, *supra. The Turnpike is the State's alter ego.*" (Emphasis added.)[10]

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[10] The universality of the rule is further evidenced by the following cases:

Cal.—Bettencourt v. *State*, 123 Cal. App. 2d 60, 266 P. 2d 201, 203 (1954); *Zeppi* v. *State*, 174 Cal. App. 2d 484, 345 P. 2d 33, 35-36 (1959).

Ind.—Wright v. *House*, 188 Ind. 247, 121 N. E. 433, 436 (1919).

Iowa—Iowa Ry. & Light Corp. v. *Lindsey*, 211 Iowa 544, 231 N. W. 461, 462 (1930).

Kan.—State ex rel. Arn v. *State Commission of Revenue and Taxation*, 163 Kan. 240, 181 P. 2d 532, 539 (1947).

La.—Hulin v. *Road Dist. No. 4, Parish of Vermilion*, 165 La. 443, 115 So. 650, 653 (1928).

Me.—State v. *Fuller*, 105 Me. 571, 75 Atl. 315, 317 (1909); *Grindell's Case*, 126 Me. 287, 138 Atl. 66, 67 (1927).

Md.—Winebrenner v. *Salmon*, 155 Md. 563, 142 Atl. 723, 725 (1928).

Minn.—Mace v. *Ramsey County*, 231 Minn. 151, 42 N. W. 2d 567, 569 (1950).

Mont.—State ex rel. State H'way Comm. v. *District Court*, 105 Mont. 44, 69 P. 2d 112, 117 (1937); *Sjostrum* v. *State H'way Comm.*, 124 Mont. 562, 228 P. 2d 238, 241 (1951).

N. H.—Grimes v. *Keenan*, 88 N. H. 230, 187 Atl. 100, 103 (1953).

N. J.—Buffington v. *Atlantic County*, 11 N. J. Misc. 443, 167 Atl. 527 (1933).

Ohio—City of Lakewood v. *Thormyer*, 154 N. E. 2d 777, 784 (Ct. of Com. Pleas, 1958), affd. 111 Ohio App. 403, 157 N. E. 2d 431 (1959).

Pa.—House v. *Pennsylvania Turnpike Commission*, 45 Pa. D. & C. 677, 679-682, 53 Dauph. Co. 38, 90 Pittsb. Leg. J. 328 (1942); *Valley Forge Gardens, Inc.* v. *Morrisey, Inc.*, 3 Pa. D. & C. 2d 164, 167-168 (1953); *Caputo* v. *Pennsylvania Turnpike Commission*, 103 Pittsb. Leg. J. 486, 487 (1955); *Greene County* v. *Center Tp.*, 305 Pa. 79, 157 A. 777, 778 (1931).

Tex.—Robison v. *Whaley Farm Corp.*, 120 Tex. 633, 37 S. W. 2d 714, 715 (1931).

Vt.—Stalbird v. *Town of Washington*, 106 Vt. 213, 172 Atl. 623, 624 (1934).

Va.—Sayre v. *Northwestern Turnpike Rd.*, 37 Va. 454, 456 (1839); *Almond* v. *Day*, 199 Va. 1, 97 S. E. 2d 824, 830 (1957).

Wis.—Muscoda Bridge Co. v. *Village of Muscoda*, 193 Wis. 457, 214 N. W. 435, 437 (1927).

Dispositive of this point, insofar as it has been specifically applied to the Thruway, is *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956). In holding, as has been heretofore stated, that this Authority is undoubtedly an arm or agency of the State, the Court said (p. 376):

> "The Thruway Authority * * * performs part of the work of the State Government in building and maintaining a highway."

(3) *The New York State Thruway Authority is clothed with the State's immunity except with respect to such causes as have been expressly statutorily allowed.*

Since, obviously, the State can act only through its various departments, officers, agencies and other instrumentalities, suits against such officers and agencies are deemed actions against the State itself so that the same rule is applicable to such action as where the State is specifically named a defendant. (*Pauchogue Land Corp.* v. *Long Island State Park Commission*, 243 N. Y. 15, 152 N. E. 451 [1926]; *Switzer* v. *Commissioners*, 134 App. Div. 487, 119 N. Y. Supp. 383 [1st Dep't, 1909].)

In *Pauchogue Land Corp.* v. *Long Island State Park Commission*, *supra*, the Court said (p. 28):

> "The complaint does not state a cause of action against the Long Island State Park Commission nor against the members thereof as such. As against them the suit is against the State itself and cannot be maintained."

The principle has been invoked many times to bar suits brought against numerous and various types of officers, agents and instrumentalities of the State of New York.

(*Smith* v. *State of New York*, 227 N. Y. 405, 125 N. E. 841 [1920; Niagara Falls State Reservation Commission]; *Pauchogue Land Corp.* v. *Long Island State Park Commission, supra; Switzer* v. *Commissioners for Loaning Certain Moneys of the United States of the County of New York, supra; Kirkman* v. *Commissioners of Palisades Interstate Park*, 200 App. Div. 870, 193 N. Y. Supp. 60 [2nd Dep't, 1922]; *Dietrich* v. *Palisades Interstate Park Commission*, 114 Misc. 425, 187 N. Y. Supp. 454 [Sup. Ct., New York Co., 1921]; *The Onteora*, 298 Fed. 553 [S. D., N. Y. 1923; Palisades Interstate Park Commission].)

In *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 (1956), the Court of Appeals said (p. 440):

> "The doctrine of sovereign immunity from suit, rooted in the ancient common law, was originally based on the monarchical, semireligious tenet that 'the King can do no wrong'. (See Borchard, Government Liability in Tort, 34 Yale L. J. 1, 2; Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 1, 17-41). In modern times, it is more often explained as a rule of social policy, which *protects the state against burdensome interference with the performance of its governmental functions and preserves its control over state funds, property and instrumentalities.* (See *United States* v. *Lee*, 106 U. S. 196, 206; see, also, Block, Suits against Public Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1061.) *The immunity extends as well to officers and agencies of the State engaged in carrying on its governmental functions, and a suit against such an officer or agency is regarded as one against the state itself.* (See, *e.g.*, *Psaty* v. *Duryea*, 306 N. Y. 413; *Breen* v. *Mortgage Comm.*, 285 N. Y. 425, 429-430; *Volk* v. *City of New York*, 284 N. Y. 279, 285-287). Most states today provide some remedy whereby individuals with claims against the government may seek redress (see Claims against the State in Minnesota; Report of the Subcommittee on Immunity of the State from Suit, 32

> Minn. L. Rev. 539, 545-556) and, in New York, the method has taken the form of a legislative waiver of the state's 'immunity from liability' in section 8 of the Court of Claims Act. The suits to which the state has thereby consented, however, must be brought in the Court of Claims and in accordance with the procedure outlined in the Act governing that court." (Emphasis added.)

Nor can there by any doubt that the State can clothe, with its own immunity, its subordinate instrumentalities, regardless of how "independent". Indeed it has generally been held that in the absence of some express waiver of immunity such bodies inherently partake of their parent's sovereign immunity. Thus, in *Matter of Brown* v. *Trustees of Hamptonburg School District*, 303 N. Y. 484, 104 N. E. 2d 866 (1954), the Court said (p. 488):

> "As an auxiliary or arm of the State Government a municipal corporation is possessed of the same immunity from suit at the hands of citizens as does the State."

And the Court continued (p. 489):

> "The right, then, of citizens to bring suit against a municipal corporation for alleged negligence in the performance of a governmental function, did not exist at common law. Furthermore, it was not in the past, nor is it at present, guaranteed by constitutional provision. The present rule, that the State and its municipal adjuncts are liable in negligence in the same manner as individuals or corporations, is statutory in origin. (Court of Claims Act, § 8; *Bernardine* v. *City of New York*, 294 N. Y. 361.) Manifestly, then, any such right granted is one which might have been withheld altogether by the Legislature. Accordingly, the right to bring suit against a municipality may be granted upon such conditions as the Legislature, in its wisdom, sees fit to impose."

Even more recently, and dealing specifically with the New York State Thruway Authority, the Court of Ap-

peals, in *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956), said (pp. 376-377):

> "Since the State as sovereign may assert, waive, or condition at will immunity from suit for itself and its agents (see *Matter of Brown* v. *Board of Trustees of Hamptonburg School Dist.*, 303 N. Y. 484, 489), the Legislature could in creating the Thruway Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal."

And at page 378 the Court said:

> "Because of sovereign immunity, none of the existing courts could have taken jurisdiction over such claims, unless the Legislature should so permit."

The respondent does not contend that it is generally immune from legal action. To the extent that the Legislature has expressly and specifically authorized suit against it, it is, of course, subject to such suits.[11]

Further than the explicit legislative subjection to suit, the immunity or lack of immunity of the Authority fol-

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[11] Thus, the following causes of action have been legislatively authorized:

(1) *Claim based upon appropriation*: exclusive jurisdiction in Court of Claims (Public Authorities Law § 358; Highway Law § 347 [13]).

(2) *Claim based upon tort*: exclusive jurisdiction in Court of Claims (Public Authorities Law § 361-b).

(3) *Claim for breach of contract relating to construction, reconstruction, improvement, maintenance, or operation*; exclusive jurisdiction in Court of Claims (Public Authorities Law § 361-b).

(4) *Action in Supreme Court, Albany County, by trustee of noteholders and bondholders*:

(a) Mandamus or other suit, action or proceeding at law or in equity to enforce all rights of the noteholders or bondholders;

(b) Suit upon such notes or bonds;

(c) Action or suit in equity to enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such notes or bonds (Public Authorities Law § 368).

lows the immunity or lack of immunity of the State. (*Bloom* v. *Jewish Board of Guardians*, 286 N. Y. 349, 352, 353, 36 N. E. 2d 617 [1941]; *Matter of Brown* v. *Trustees, Hamptonburg School District*, 303 N. Y. 484, 488, 104 N. E. 2d 866 [1954]; *Gifford* v. *Whittemore*, 4 A. D. 2d 379 [3rd Dept., 1957].)

The petitioner's reference to NICHOLS' *Law of Eminent Domain* (3rd Ed., 1950, Vol. 3, p. 151) and the supporting Massachusetts case[12] involves the proposition that "Where * * * a release is obtained by fraud the owner of the land may have it voided." The proposition is, of course, a correct statement of the substantive rule that fraud renders a contract voidable at the instance of the injured party. But it is quite irrelevant to the issue herein. Here the issue is not whether or not there is a substantive foundation for an action based on fraud, but rather, conceding, *arguendo*, the existence of such a cause of action, whether or not the respondent is amenable to an action for rescission based upon the fraud.

Since, as has been demonstrated, the State has not waived its immunity from suits in equity, it follows that such a suit may not be maintained against the respondent. Although the respondent may be sued for money damages upon statutorily authorized causes in the State Court of Claims, it is not, in the performance of its governmental functions, subject to coercion, mandate or adjudication under equity decrees.

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[12] Page 27 of petitioner's brief.

(4) *The statutory power "to sue and be sued," conferred upon the New York State Thruway Authority, does not detract from its immunity.*

The provision of Public Authorities Law § 354(1) that the Authority shall have power "to sue and be sued" does not destroy the respondent's immunity. In *Glassman* v. *Glassman*, 309 N. Y. 436, 131 N. E. 2d 721 (1956), the Court said (p. 441):

> "Instead, she [*i.e.*, the plaintiff] urges that immunity should be denied the System because, first, she has no other remedy, since the Court of Claims would have no jurisdiction over either an equitable action of this kind (*cf. Psaty* v. *Duryea, supra*, 306 N. Y. 413, 416-417) or the person of the individual defendant and, second, the System enjoys the powers and privileges of a corporation and, therefore, 'must also accept the responsibilities of a corporation' and be amenable to the jurisdiction of a court of equity. In our view, neither of these contentions can assist plaintiff; the immunity of a state agency is in no way affected by the lack of any other remedy (see *Psaty* v. *Duryea, supra*, 306 N. Y. 413, 419-420; *Buckles* v. *State of New York*, 221 N. Y. 418, 423-424) or by the fact that the agency is endowed with the powers and privileges of a corporation. (See, *e.g.*, *Breen* v. *Mortgage Comm.*, *supra*, 285 N. Y. 425, 430; *Matter of Hicka*, 180 Misc. 173, 175-176; *Arkansas* v. *Texas*, 346 U. S. 368, 370.)"

The Courts have consistently refused to construe the power to sue and be sued as a general waiver of immunity. In *Breen* v. *Mortgage Commission*, 285 N. Y. 425, 431, 35 N. E. 2d 25 (1941), the Court held that there was no jurisdiction of the Mortgage Commission and the Mortgage Commission Servicing Corporation, notwithstanding their power to sue and be sued and notwithstanding the corporate capacity of the latter, reiterating the principle that "Statutes in derogation of the sovereign immunity of the

State to suit are strictly construed. (*Smith* v. *State*, 227 N. Y. 405, 410.)" See also *Lacock* v. *City of Schenectady*, 224 App. Div. 512, 231 N. Y. Supp. 379 (3rd Dept., 1928), aff'd 251 N. Y. 575 (1929); *Beldon* v. *Mortgage Commission*, 173 Misc. 731, 19 N. Y. S. 2d 112 (Sup. Ct., New York Co., 1940); *Smith* v. *State of New York*, 227 N. Y. 405, 408, 409-410, 125 N. E. 841 (1920); *Dietrick* v. *Palisades Interstate Park Comm.*, 114 Misc. 425, 429, 187 N. Y. Supp. 454 (Sup. Ct., New York Co., 1921).

In *The Onteora*, 298 Fed. 553 (S. D. New York, 1923), Judge LEARNED HAND said (p. 554):

> "The libelant's argument is that the corporate form given to the claimants (Palisades Interstate Park Commission), together with their express subjection to suit, shows an intention to make them generally liable like a municipality, and that municipalities, except in their governmental functions, are liable as tort-feasors. *Missano* v. *Mayor*, 160 N. Y. 123, 54 N. E. 744; *Gartland* v. *N. Y. Zoological Society*, 135 App. Div. 103, 120 N. Y. Supp. 24. But the distinction in respect of municipalities has never been applied to a state, which can be made liable only when it has given an express consent. Moreover, the claimants are not a municipality, as I have said, though a 'body politic.' Besides, the argument that consent to be sued carried by implication the recognition of a liability in tort was met and denied in *Smith* v. *State*, *supra*. I can see no valid distinction whether the proposed defendant be the state itself or a state agency."

It is conceded that the *Federal* rule, when dealing with a *Federal* corporation or agency, construes the "sue and be sued" clause as a waiver of immunity (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 [1939]). Nevertheless, the Federal Courts, where suit is brought against an entity which is a mere arm or agency of the State, or merely a channel through which the State per-

forms part of its necessary governmental functions, or completely identified with the State in the performance of its public functions, have held that the suit is one against the State and, under the Eleventh Amendment, not within the jurisdiction of a Federal Court (*Kansas City Bridge Co.* v. *Alabama State Bridge Corp.*, 59 F. 2d 48, 49, 50 [5th Cir., 1932]; *Fowler* v. *California Toll-Bridge Authority*, 128 F. 2d 549 [9th Cir., 1942]; *Broadwater-Missouri Water Users' Assn.* v. *Montana Power Co.*, 139 F. 2d 998, 1000-1001 [9th Cir., 1944]; *Wexler* v. *Janney*, 177 F. 2d 808 [4th Cir., 1949]; *Dunnuck* v. *Kansas State Highway Comm.*, 21 F. Supp. 882 [D. C. Kansas, 1937]; *Chicago Stadium Corp.* v. *State of Indiana*, 123 F. Supp. 783 [S. D. Indiana, 1954], reversed and remanded on other grounds 220 F. 2d 797 [7th Cir., 1955]).

During the most recent consideration of this question by this Court—*Petty* v. *Tennessee-Missouri Comm.*, 359 U. S. 275 (1959)—on the assumption that the suit "must be considered as one against the States since this bi-state corporation is a joint or common agency of Tennessee and Missouri" (p. 279), the Court interpreted the "sue and be sued" clause under the Federal rule because the corporation was created by an interstate compact which had to receive the approval of Congress and, therefore, the resolution of the question of sovereign immunity was held to require the application of Federal, not State law (p. 280). Actually, the view that a bi-state agency, much less the agency of a single State, was not immunized from suit, was held by only three members of the Court. On the question of the applicability of State law, rather than Federal law, to the sovereign immunity asserted by the bi-state agency involved in *Petty*, three members of the Court[13]

[13] Chief Justice Warren and Justices Douglas and Brennan.

held for application of the Federal rule, three members[14] concurred in the judgment and opinion of the Court, but did not reach the question whether the Eleventh Amendment immunizes from suit agencies created by two or more States under State compacts which the Constitution requires to be approved by the Congress, and three members[15] dissented, upholding the view that State law should be applied to the question. Mr. Justice FRANKFURTER said (pp. 283-284):

> "The Court of Appeals below held that in neither Missouri nor Tennessee would the language 'sue and be sued' render a public corporation liable for suit in tort. 254 F. 2d 857. Three times during this Term the Court followed its settled practice in dealing with a doubtful state statute by deferring to interpretations of local law rendered by the lower federal courts. [Citing *Sims* v. *United States*, 359 U. S. 108; *The Tungus* v. *Skovgaard*, 385 U. S. 588; *United Pilots Assn.* v. *Hallecki*, 358 U. S. 613.] We should not now disregard this settled practice but should accept the interpretation of Missouri and Tennessee law as found by the Court of Appeals for the Eighth Circuit."

The petitioner points to *United States* v. *Lee*, 106 U. S. 196 (1882), as exemplifying a constitutional exception to the doctrine of sovereign immunity, but this Court held in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682 (1949), that even under the Federal rule the waiver of immunity was up to Congress, and that though Congress may have permitted suits for money damages against a Federal corporate entity, it had not permitted an equitable suit for an injunction. The Court said (pp. 704-705):

> "It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which

[14] Justices BLACK, CLARK and STEWART.

[15] Justices FRANKFURTER, HARLAN and WHITTAKER.

> requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names. In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the *Lee* doctrine."

In the dissenting opinion, Mr. Justice FRANKFURTER, in classifying the earlier cases dealing with the question of sovereign immunity where a State agency or officer was involved, classified the cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority (p. 710 n. 4; pp. 731-732). These cases justified recovery, but even here the Justice said (p. 716):

> "And if the relief necessarily implicates a resort to State funds the State becomes an indispensible party and without its consent the suit must fail. See *Louisiana* v. *McAdoo* [234 U. S. 627], *supra*; *Lankford* v. *Platte Iron Works*, 235 U. S. 461."

It is pertinent in this connection to observe that not only is title to the real property of the Thruway Authority presently held in the name of the State of New York (Public Authorities Law §§ 354[4], 358, 358a), but all of its property must ultimately be vested in the State (Public

Authorities Law § 352), and the latter is authorized to, and has guaranteed, payment of the Authority's bonds and notes (Public Authorities Law § 366).

C. The petitioner is not entitled to equitable relief in any event because adequate alternative relief at law is available in the State's Court of Claims.

The petitioner's allegation of "no adequate remedy at law" (15, 16) is legally untenable because the facts alleged by her establish a cause of action for deceit, a tort which may be the subject of a claim in the State Court of Claims (Public Authorities Law § 361-b). However, despite the fact that the New York Supreme Court is a Court of general jurisdiction in law and equity, the Legislature, pursuant to constitutional authorization, has vested the Court of Claims with *exclusive* jurisdiction of actions against the Authority which sound in tort (Public Authorities Law § 361-b).[16]

Furthermore, the petitioner is authorized to sue in the Court of Claims on its original claim which arose out of

[16] The petitioner's statement (Brief, p. 13) that money damages can be awarded by the State Supreme Court under the omnibus relief clause in her complaint (16) is without legal foundation, except as to an action brought by the trustee of the noteholders and bondholders. (See footnote 11 on page 31, *supra*.) *Panless* v. *Saratoga Springs Authority*, 255 App. Div. 426, 8 N. Y. S. 2d 103 (3rd Dept., 1938) and *Strang* v. *State*, 206 Misc. 734, 134 N. Y. S. 2d 871 (Ct. Cl., 1954), cited by the petitioner in support of the statement that New York's Supreme Court has jurisdiction over the Thruway Authority, deals with a rule of jurisdiction which is obsolete, not because the Court of Appeals ruled to the contrary in the case at bar, but because subsequent to those decisions the Legislature conferred exclusive jurisdiction upon the Court of Claims and withdrew the jurisdiction of the Supreme Court. The legislative change was, of course, recognized by the Court of Appeals in the case at bar.

the appropriation of her property (Public Authorities Law § 358; Highway Law § 347[13]) and in this case, too, the jurisdiction of the Court of Claims is exclusive. The respondent, of course, may interpose the Agreement of Adjustment by way of avoidance, and may request the Court to render an award in the amount which has been agreed upon in the Agreement of Adjustment. In such action the petitioner would be in a position, and it would be her burden, to allege and prove the invalidity of the Agreement on whatever legal grounds she chose. The Court of Claims has jurisdiction to grant incidental equitable relief as part of its omnibus jurisdiction respecting claims. See, for examples: *Morey* v. *State of New York*, 283 App. Div. 562, 129 N. Y. S. 2d 27 (3rd Dept., 1954); *Menna* v. *State of New York*, 10 A. D. 2d 753, 197 N. Y. S. 2d 528 (3rd Dept., 1960); *Amity Operating Co.* v. *State of New York*, 207 Misc. 830, 140 N. Y. S. 2d 789 (Ct. Cl., 1955).

There is nothing either in the State statutes or decisions which requires a claimant in an appropriation case to first cause an "Agreement of Adjustment" to be judicially cancelled as a condition precedent to the filing in the Court of Claims of a claim based upon the appropriation.

It follows that (1) the New York Supreme Court has no jurisdiction of the remedy which is available to the petitioner, and (2) the existence of the remedy defeats the petitioner's cause of action even if the question of immunity is disregarded.

However, the petitioner emphasizes the fact that the Court of Appeals found that she is without a remedy, but that the absence of a remedy does not affect the right of the State or a State agency to assert its immunity. Although, as has been shown, the petitioner did have a right

to prosecute her original claim upon the appropriation, the fact of the matter is that her cause of action has been barred by the statute of limitations.[17] This, of course, was necessarily the basis of the Court's statement that the petitioner was without a remedy. Nevertheless, it must be observed that the possessor of a statutorily-barred claim at law cannot thus qualify for equitable relief on the basis of the self-induced loss. Furthermore, the statute of limitations does not necessarily effect a bar to the claim. The petitioner is still free to petition the Legislature for an enabling act to permit the revival of the claim and its prosecution in the Court of Claims.

Thus, in the last analysis, although the absence of a remedy does not bar the respondent's right to assert its immunity, the presence of the remedy effectively bars the petitioner's suit for equitable relief.

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[17] The New York Court of Claims Act § 10(1) provides for a period of two years within which claims must be filed.

CONCLUSION

The petition for a writ of certiorari should be dismissed, as having been improvidently granted; or the judgment of the Court below should be affirmed.

Dated: Albany, New York, December 22, 1961.

Respectfully submitted,

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Appendix

U. S. Constitution, Amendment XI

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendment XIV

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

N. Y. Highway Law

"§ 347. *Property for state thruways, bridges thereon, and other thruway uses and purposes to be acquired by appropriation*

* * *

12. Claims for the value of the property appropriated and for legal damages caused by any such appropriation where not otherwise specifically provided for in this section may be adjusted by the superintendent of public works even though a claim has been filed with the court of claims, if the amount thereof can be agreed upon with the owner or owners thereof. If the amount of a claim cannot be agreed upon, the superintendent of public works may enter into an agreement with the owner or owners providing for payment of an amount equal to sixty percent of the amount determined by the superintendent to be the value of such claim reserving to such owner or owners, however, the right to file such claim with the court of claims or if a claim has been filed reserving the right to prosecute said claim. The reservation of the right to file said claim in the court of claims shall not extend or affect in any way the time limited for the filing of such claim as provided for in the court of claims act. Upon making any such agreement the superintendent of public works shall deliver to the comptroller

such agreement and a certificate stating the amount due such owner thereunder on account of such appropriation of his property and the amount so fixed shall be paid out of the state treasury from moneys appropriated for the construction, reconstruction and maintenance of state thruways and bridges thereon, but not until there shall have been filed with the comptroller a certificate of the attorney general showing the person or persons claiming the amount so agreed upon to be legally entitled thereto.

13. Any owner may present to the court of claims a claim for the value of such property appropriated and for legal damages, as provided by law for the filing of claims with the court of claims. Awards and judgments of the court of claims shall be paid in the same manner as awards and judgments of that court for the acquisition of lands generally and shall be paid out of the state treasury from moneys appropriated for the construction, reconstruction and maintenance of state thruways and bridges thereon."

N. Y. Public Authorities Law—Title 9

"*§ 352. New York state thruway authority*

1. A board to be known as 'New York state thruway authority' is hereby created. Such board shall be a body corporate and politic constituting a public corporation. It shall consist of three members appointed by the governor by and with the advice and consent of the senate.

• • •

4. Such board and its corporate existence shall continue so long as it shall have notes, bonds or other obligations outstanding (including notes, bonds or obligations hereafter issued or incurred) and until its existence shall be terminated by law. Upon the termination of the existence of the authority, all its rights and properties shall pass to and be vested in the state."

Appendix

"§ 353. *Purposes of the authority and benefits therefrom*

The authority is created to and shall have power to construct, reconstruct, improve, maintain or operate a thruway system as provided by this title together with facilities for the public incidental thereto. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York for the increase of their pleasure, convenience and welfare, for the improvement of their health, to facilitate transportation for their recreation and commerce and for the common defense; and the authority shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title."

"§ 354. *Powers of the authority*

Except as otherwise limited by this title, the authority shall have power

1. To sue and be sued;

2. To have a seal and to alter the same at pleasure;

3. To acquire, hold and dispose of personal property for its corporate purposes;

4. To acquire and hold in the name of the state by purchase or appropriation real property or rights or easements therein and to sell, exchange, or otherwise dispose of any real property not necessary for its corporate purposes or whenever the board shall determine that it is in the interest of the authority;

• • •

6. To appoint officers, agents and employees and fix their compensation; subject however to the provisions of the civil service law, which shall apply to the authority as a municipal corporation other than a city;

7. To make contracts, and to execute all instruments necessary or convenient;"

Appendix

"§ 355. *Officers and employees; transfer, promotion and seniority*

1. Officers and employees of state departments and agencies may be transferred to the authority and officers and employees of the authority may be transferred to state department and agencies without examination and without loss of any civil service status or rights. No such transfer may, however, be made except with the approval of the head of the state department or division involved and the director of the budget and the chairman of the authority and in compliance with the rules and regulations of the state civil service commission.

2. Promotions from positions in state departments and agencies to positions in the authority, and vice versa, may be made from interdepartmental promotion lists resulting from promotion examinations in which both employees of the authority and employees of the state are eligible to participate.

3. In computing seniority for purposes of promotion or for purposes of suspension or demotion upon the abolition of positions in the service of the authority or in the service of the state, in the case of an employee of the authority a period of prior employment in the service of the state shall be counted in the same manner as though such period of employment had been in the service of the authority, and in the case of an employee of the state a period of prior employment in the service of the authority shall be counted in the same manner as though such period of employment had been in the service of the state. For the purposes of the establishment and certification of preferred lists, employees suspended from the authority shall be eligible for reinstatement in the service of the state, and employees suspended from the service of the state shall be eligible for reinstatement in the service of the authority, in the same manner as though the authority were a department of the state."

Appendix

"§ 356. *Thruway sections and connections; assuming jurisdiction*

At any time after this title shall become effective the authority may adopt a resolution assuming jurisdiction for its corporate purposes of any or all of the thruway sections or connections below described and such connections with highways, hereinafter referred to as 'highway connections', as the authority may deem advisable in the interest of the public to serve traffic needs, and the authority shall continue to have such jurisdiction so long as its corporate existence shall continue.

Pending the adoption of such resolution, the superintendent shall have all the powers herein conferred upon the authority to construct, reconstruct, improve, maintain, and operate such thruway sections and connections, and highway connections, and to acquire in the name of the state real property therefor."

"§ 357. *Right of authority to use state property; payment for improvements*

1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall continue, any real property and rights in real property theretofore acquired by the state, including all improvements thereon and state canal lands and properties; provided that the use by the authority of canal lands and properties shall not interfere with the use thereof for canal purposes."

"§ 358. *Acquisition of real property by the superintendent*

1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation thereof, in addition to real property theretofore acquired by the state,

If funds are made available by the authority for payment of the cost and expense of the acquisition thereof, the superintendent when requested by the authority shall acquire such real property in the name of the state by appropriation, and, where necessary, remove the owner or occupant thereof and obtain possession according to the procedure provided by section three hundred forty-seven of the highway law. The authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall continue all such real property and rights in real property so acquired.

2. Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the superintendent with the approval of the authority, or by the court of claims as provided in said section three hundred forty-seven. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before said court. All awards and judgments arising from such claims shall be paid out of moneys of the authority."

"*§ 358-a. Acquisition of real property by the authority*

On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation of such thruway section or connection or part thereof, or of a highway connection, in addition to real property acquired or to be acquired by the state, and thereupon may acquire such real property by condemnation pursuant to the condemnation law. The authority may also, and in any case, acquire real property in the name of the state by deed and may pay such price therefor as shall be agreed with the owner thereof."

"§ *359. Construction, reconstruction and improvement*

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2. All construction, reconstruction and improvements and any engineering work required in connection therewith which are performed on behalf of the authority by the superintendent shall be carried on, generally, in the same manner and subject to the same provisions of law as apply to the construction and improvement of state highways."

"§ *360. Operation and maintenance*

Operation and maintenance by the authority of any thruway section or connection or any part thereof or of a highway connection of which it has assumed jurisdiction shall be performed (a) by the use of authority forces and equipment; (b) by contract with municipalities or independent contractors; (c) at the request of the authority, by the superintendent and his subordinates in the department of public works as agents for, and at the expense of the authority, or (d) by a combination of such methods."

"§ *361. Traffic control*

1. (a) In addition to the powers conferred by the vehicle and traffic law, the authority is hereby authorized to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience, for the preservation of its property and for the collection of tolls.

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2. Enforcement of the rules and regulations of the thruway authority and of those provisions of the vehicle and traffic law applicable to the thruway shall be by authority forces, provided, however, that at the request of the authority, such enforcement shall be the duty of the division of state police. Violators shall be apprehended and prosecuted in the same manner as

provided for the apprehension and prosecution of violators of the vehicle and traffic law who commit violations thereof upon the state highway system. Authority forces employed for the enforcement of such rules and regulations, during the term of such employment, shall be uniformed, shall be peace officers, as defined by section one hundred fifty-four of the code of criminal procedure, and shall have, within the limits of any municipality within which any portion of the thruway system under the jurisdiction of the authority shall be located, all the powers of a constable, marshal, sheriff, police constable or policeman of a municipality in the execution of criminal processes; and criminal process issued by any court or magistrate of a municipality within which any portion of the thruway system under the jurisdiction of the authority shall be located, may be directed to and executed by any such employee notwithstanding the provisions of any local or special law, ordinance or regulation."

"§ *361-b. Jurisdiction in certain suits against the authority*

Exclusive jurisdiction is hereby conferred upon the court of claims to hear and determine the claims of any person against the authority (a) for its tortious acts and those of its agents, and (b) for breach of a contract relating to construction, reconstruction, improvement, maintenance or operation, in the same manner and to the extent provided by and subject to the provisions of the court of claims act with respect to claims against the state, and to make awards and render judgments therefor. All awards and judgments arising from such claims shall be paid out of moneys of the authority."

"§ *362. Assistance by state officers, departments, boards, divisions and commissions*

At the request of the authority, engineering and legal services for such authority shall be performed by forces or officers of the department of public works and the department of law respectively, and all other

state officers, departments, boards, divisions and commissions shall render services within their respective functions. At the request of the authority, services in connection with the collection of annual fees for the use of the thruway or any part thereof by motor vehicles shall be performed by the department of taxation and finance through the bureau of motor vehicles."

"§ *363. Annual report*

The authority shall submit to the governor, to the legislature, to the comptroller and to the director of the budget on or before the first day of February of each year a detailed report setting forth its operations and fiscal transactions during the preceding calendar year with a statement of its financial condition as of the end of such year and a statement of all receipts and expenditures during such year."

"§ *364. Deposit and investment of moneys of the authority*

All moneys of the authority from whatever source derived shall be paid to the comptroller as agent of the authority, who shall not commingle such moneys with any other moneys.

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The comptroller and his legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the authority, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other matters relating to its financial standing.

Notwithstanding the provisions of this section, the authority shall have power, subject to the approval of the comptroller, to contract with the holders of any of its notes or bonds as to the custody, collection, securing, investment and payment of any moneys of the authority, or any moneys held in trust or otherwise for the payment of notes or bonds or in any way

to secure notes or bonds, and to carry out any such contract.

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Moneys of the authority not required for immediate use may, in the discretion of the authority, be invested by the comptroller in obligations of the United States government or of the state of New York.

Subject to agreements with noteholders and bondholders and the approval of the comptroller, the authority shall prescribe a system of accounts."

"§ *366. Guaranty by the state*

1. To the extent authorized by the constitution at the time of the issuance of notes or bonds, the punctual payment of the notes and bonds shall be, and the same hereby is, fully and unconditionally guaranteed by the state, both as to principal and interest, according to their terms; and such guaranty shall be expressed upon the face thereof by the signature or facsimile signature of the comptroller or a deputy comptroller. In the event that the authority shall fail to pay when due, the principal of, or interest on, the notes or bonds, the comptroller shall pay the holder thereof, and thereupon the state shall be subrogated to the rights of the noteholders or bondholders so paid."

"§ *368. Remedies of noteholders and bondholders*

1. In the event that the authority shall default in the payment of principal of or interest on any issue of notes or bonds after the same shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of thirty days, or in the event that the authority shall fail or refuse to comply with the provisions of this title, or shall default in any agreement made with the holders of any issue of notes or bonds, the holders of twenty-five per centum in aggregate principal amount of the notes or bonds of such issue then outstanding, by instrument or instruments filed in the office of the clerk of the county of Albany and proved or acknowledged in the

same manner as a deed to be recorded, may appoint a trustee to represent the holders of such notes or bonds for the purposes herein provided.

2. Such trustee may, and upon written request of the holders of twenty-five per centum in principal amount of such notes or bonds then outstanding shall, in his or its own name

(a) by mandamus or other suit, action or proceeding at law or in equity enforce all rights of the noteholders or bondholders, including the right to require the authority to collect fees, rentals and charges adequate to carry out any agreements with the holders of such notes or bonds and to perform its duties under this title;

(b) bring suit upon such notes or bonds;

(c) by action or suit in equity, require the authority to account as if it were the trustee of an express trust for the holders of such notes or bonds;

(d) by action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such notes or bonds;

(e) declare all such notes or bonds due and payable, and if all defaults shall be made good then with the consent of the holders of twenty-five per centum of the principal amount of such notes or bonds then outstanding, to annul such declaration and its consequences; provided, however, that this clause (e) shall not be applicable in the case of notes or bonds guaranteed by the state."

"§ *369. Liability of state*

The state shall be liable on notes or bonds guaranteed hereunder but shall not be liable on notes or bonds not guaranteed by the state which shall not be a debt of the state."

"§ *371. Tax exemption*

The property of the authority and its income and operations shall be exempt from taxation."